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No. 775

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964.

COLUMBIA ARTISTS MANAGEMENT INC. and COMMUNITY CONCERTS, INC.,

Appellants,

against

UNITED STATES OF AMERICA; SUMMY-BIRCHARD, INC.; NATIONAL CONCERT AND ARTISTS CORPORATION; and CIVIC CONCERT SERVICE, INCORPORATED,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

STATEMENT AS TO JURISDICTION.

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IN THE

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OCTOBER TERM, 1964.

COLUMBIA ARTISTS MANAGEMENT INC. and
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Appellants,

against

UNITED STATES OF AMERICA; SUMMY-BIRCHARD, INC.; NATIONAL CONCERT AND ARTISTS CORPORATION; and CIVIC CONCERT SERVICE, INCORPORATED,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

Statement as to Jurisdiction.

Appellants Columbia Artists Management Inc. (hereafter "Columbia") and Community Concerts, Inc. (hereafter "Community"), appeal from an order of the United States District Court for the Southern District of New York denying Claim II of their petition for construction of the Final Judgment in this action. The District Court held, without a hearing on the facts, that the Final Judgment, a consent judgment entered in 1955 in a civil action brought by the United States under the Sherman Act, is illegal and void insofar as it operates to allow resale price maintenance, and modified the judgment accordingly.

Opinions Below.

The District Court (Tyler, J.) filed two opinions, one on November 19, 1963 and the second, on reargument, on April 3, 1964. Neither opinion is reported officially. The

opinions are reported unofficially at 1963 Trade Cases ¶70,955 and 1964 Trade Cases ¶71,081, respectively. Both opinions and the order of the District Court are annexed hereto as Appendix A.

Jurisdiction.

On October 20, 1955 the United States brought an action under Section 4 of the Sherman Act (15 U. S. C. §4) against Columbia, Community*, a wholly-owned subsidiary of Columbia, National Concert and Artists Corporation (hereafter "NCAC") and Civic Concert Service Incorporated (hereafter "Civic"), a wholly-owned subsidiary of NCAC. The action sought to prevent and restrain alleged violations of Sections 1 and 2 of the Sherman Act (15 U. S. C. §§1 and 2). The title of the action as originally docketed was *United States* v. *Columbia Artists Management Inc. et al.* On October 20, 1955, concurrently with the filing of the action, a judgment on consent (hereafter "the Final Judgment") was entered. The Final Judgment is annexed hereto as Appendix B. Thereafter, Summy-Birchard, Inc. (hereafter "Summy-Birchard") acquired and conducted the business of NCAC and, pursuant to Paragraph III of the Final Judgment, became subject to its terms.

On July 17, 1963, Columbia petitioned the District Court for orders and directions for construction of the Final Judgment. Columbia's petition set forth two claims, designated as Claim I and Claim II. On November 19, 1963, the lower court filed an opinion granting Columbia's petition on Claim I and denying Claim II. Columbia moved for reargument on Claim II and that motion was granted in part in an order entered on January 14, 1964. Thereafter, reargu-

* Columbia and Community are herein sometimes referred to jointly as "Columbia".

ment was heard and, on April 3, 1964, the District Court filed a second opinion in which it reaffirmed its opinion of November 19, 1963.

The order of the District Court granting Claim I of Columbia's petition, denying Claim II, and modifying the Final Judgment, was entered on June 11, 1964. The notice of appeal was filed in that Court on August 7, 1964.

The jurisdiction of this Court to review the District Court's decision by direct appeal is conferred by Section 2 of the Expediting Act, Title 15, United States Code, Section 29. The following decisions sustain the jurisdiction of this Court to review on direct appeal the order in this case: *U. S. Gypsum Co.* v. *National Gypsum Co.*, 352 U. S. 457 (1957); *Swift & Co.* v. *United States*, 276 U. S. 311 (1928); *Terminal R. R. Assn.* v. *United States*, 266 U. S. 17 (1924).

Questions Presented.

The following questions are presented by this appeal:

1. In 1955, the Government brought a civil action under the Sherman Act against appellants and another. A Final Judgment was entered by the District Court on consent concurrently with the filing of the complaint. Where appellants, in 1963, petition the District Court to construe the Final Judgment to determine whether a provision in appellants' contracts violates the Final Judgment, and where the court finds that such provision is permitted by the Final Judgment, does the District Court have the power to modify the Final Judgment, without appellants' consent, to forbid the use of such provision where there is no showing of any change in fact or law since the judgment was entered?

2. Was the District Court correct in finding, without a hearing, that appellants' contract provision, contemplated

and sanctioned by the Final Judgment, constituted illegal vertical price fixing?

3. Assuming *arguendo* an affirmative answer to questions 1 and 2, should the court have properly vacated the entire Final Judgment?

Statement.

Columbia and Summy-Birchard are both managers of concert artists, acting as agents of the artist in arranging engagements, booking tours and also acting as their general advisors. The standard contract between Columbia and each artist managed by it provides for an artist's established fee, that is, the fee, set by the artist, at which he will perform. The standard contract further provides that no engagement may be booked at less than that established fee except upon the artist's consent.*

Community and Civic are in the concert service business. Concert services organize and maintain audience associations throughout the country. An audience association is a non-profit association organized for the purpose of presenting a series of concerts in a locality, and its members are citizens of that locality. The concert service sends field representatives into the locality to assist in the organization, fund-raising and membership drives conducted by the audience association. The funds collected from members are then used to book artists for a series of concerts which can be attended only by members of the association. The concert service's field representatives assist the audience association in selecting the artists who will be presented

* Columbia alleged and would have shown at a hearing that this provision is required by a collective agreement among managers and the concert artists' union, the American Guild of Musical Artists.

in the association's concert series. The artists selected must be booked for the association by the organizing concert service, and their fees are paid to that concert service. The concert service then transmits the fees to each artist's manager for ultimate payment to the artist, deducting a portion of each fee to compensate it for establishing and maintaining the association. This portion of the artist's established fee which the artist authorizes the concert service to retain is known as "margin", and is so defined in the Final Judgment.

As is required by its contracts with artists, Columbia's form contracts with concert services for the appearance of Columbia-managed artists before audience associations have provided for payment by the association of the artist's established fee for each engagement. Columbia's form contracts have stated in relevant part:

> "It is agreed that this contract for the appearance of [name of Artist] is solely for the purposes of an engagement on the organized audience series in [town] for [dates] at the fee of $ per engagement provided for in Columbia listings and any offer or arrangement to change the sponsorship or fee without the prior consent in writing obtained from the artist or his manager will void this contract."

In 1963, Summy-Birchard informed Columbia that the aforesaid provision constituted illegal resale price maintenance and that it was a violation of the Final Judgment. Summy-Birchard stated that it would sign Columbia's form contracts for the appearance of Columbia's artists before Civic's audience associations under protest. Summy-Birchard's position, in essence, was that an artist's performance was "bought" by a concert service and then "sold" to an audience association and that the concert

service—and not the artist or his manager—had the right to determine the fee to be paid by the audience association.

Columbia replied that there could be no illegal resale price maintenance because the concert service did not "buy" artists' performances but merely acted as agent for the audience association in booking artists. In any event, Columbia contended there could be no violation of the Final Judgment because the decree makes specific provision in many places—such as in the definition of margin—for the artist's established fee, and thus clearly contemplates that the artist and not the concert service is to determine the price to be paid by the audience association for the artist's performance.

Pursuant to Paragraph IX of the Final Judgment, Columbia, on August 13, 1963, petitioned the District Court for orders and directions for the construction of the decree. Columbia's petition set forth two claims. Claim I, which dealt with another dispute with Summy-Birchard, is not here relevant. In Claim II of its petition, which is the subject of this appeal, Columbia sought an order that its contract provision did not violate the Final Judgment.

Summy-Birchard answered Columbia's petition admitting certain allegations and denying others. The Government appeared and supported Columbia's position on Claim I but took no position on the merits of Claim II on the grounds that there was no justiciable controversy between Columbia and Summy-Birchard. No affidavits were submitted by the parties and no trial or hearing on the facts was held.

On November 19, 1963, the District Court filed its opinion granting Columbia's petition on Claim I but denying Claim II. With respect to Claim II, the court held (App. A pp. 8-9) that the Final Judgment:

> "... clearly envisions that the artist or his manager will be able to control the ultimate price paid by the 'consumer'—audience association, impresario, or whoever assumes the risk of 'producing' a show. Were this not so, the definition of 'margin' in the decree would be meaningless."

But then, treating Summy-Birchard's papers and oral argument as a petition for modification of the decree*, the court reviewed *de novo* the legality of the Final Judgment and found the decree to be in part illegal under the Sherman Act. The court ruled (App. A p. 11) that:

> "... insofar as the decree-imposed requirement of margin operates to allow Columbia to set resale prices, the decree is illegal and void as contrary to the letter and policy of the Sherman Act, and this court will not construe Columbia's continued reliance upon that portion of the decree to be in any way valid."

The court said that if a concert service was the agent either of the artist or of the audience association "... there is, of course, no 'sale' and no illegal pattern which falls afoul of the Sherman Act" because there would no longer be an intermediate party between the original seller and ultimate buyer. The court held, however, that no agency

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* The District Court said (App. A pp. 9-10):

> "At least in the special circumstances of this case, in which the court has already retained jurisdiction to hear motions for construction of its decree and in which it appears that the legality of the decree, or at least of practices envisioned by or naturally flowing from the decree, is being questioned, it would seem to be hypertechnical and time-consuming judicial administration to reject jurisdiction of this particular dispute just because Summy-Birchard has not filed a paper labeled 'petition for declaratory judgment' or 'petition for modification', particularly if substantially the same facts and arguments to be raised by such putative formal pleadings are now before the court."

relationship existed. The District Court concluded that ". . . Summy-Birchard may charge its audience associations [for artists] whatever it pleases, because allowing Columbia to set these prices is illegal resale price maintenance . . . " (App. A pp. 10, 12).

Columbia moved for reargument on the same grounds now urged for reversal. On January 14, 1964, the District Court granted Columbia's motion on the question whether an agency relationship existed between an audience association and a concert service, stating that affidavits and memoranda on the issue would be received. Columbia submitted an affidavit from one of its officers to the effect that such relationship existed between Community and its audience associations. Neither the Government nor Summy-Birchard submitted affidavits. The Government submitted a memorandum stating that the court's decision was correct and should be reaffirmed. On April 3, 1964, the court filed its opinion on reargument, reaffirming its previous decision.

In its order, entered on June 11, 1964, the District Court reiterated its position that the decree sanctioned Columbia's contract provision, but was illegal insofar as it contemplated resale price maintenance. The order stated in relevant part

> "To the extent that the Final Judgment operates to allow Columbia to set such resale prices, it is illegal and void as contrary to the Sherman Act, and any continued reliance by Columbia upon such portion or portions of the Final Judgment will not be construed by the Court to be in any way valid" (App. A p. 22).*

* The Government objected vigorously to the inclusion of this sentence in the order on the grounds that the District Court had not modified the Final Judgment, and did not ". . . find a single word in the Final Judgment to be illegal or void." Government Memorandum of June 4, 1964, p. 2. The District Court rejected the Government's argument.

The First Question is Substantial.

A consent decree, like an ordinary judgment, is a judicial act, *Pope* v. *United States,* 323 U. S. 1, 12 (1944); *United States* v. *Swift & Co.,* 286 U. S. 106, 115 (1932); *United States* v. *Radio Corporation of America,* 46 F. Supp. 654 (D. Del. 1942), *appeal dismissed,* 318 U. S. 796 (1943), and is *res judicata* as to the matters actually settled therein. *Lawlor* v. *National Screen Service,* 349 U. S. 322, 327-329 (1955); *United States* v. *International Building Co.,* 345 U. S. 502 (1953); *United States* v. *Parker,* 120 U. S. 89 (1887). The doctrine of *res judicata* precludes a court from modifying an antitrust consent judgment on the ground that it was erroneous when rendered. *Swift & Co.* v. *United States,* 276 U. S. 311 (1928); *United States* v. *Int. Harvester Co.,* 274 U. S. 693 (1927); see Dabney, *Antitrust Consent Decrees: How Protective an Umbrella?* 68 YALE L. J. 1391 (1959).

The Federal Rules of Civil Procedure contain several provisions under which parties to final judgments may be relieved from their operation. See Rules 59 and 60, FRCP. Unless a litigant can fit himself within one of these provisions, the *res judicata* doctrine controls, for the Federal Rules are exclusive. Rule 60(b) Federal Rules of Civil Procedure. See 7 Moore's Federal Practice ¶60.26[4], ¶60.35[1] (1955 Ed.). Even a casual glance at the Rules, reveals no provision whereby a party may seek modification of a final judgment because it was erroneous when rendered. In fact, this Court, in *System Federation* v. *Wright,* 364 U. S. 642 (1961), has recently held that Rule 60(b) incorporates a consistent line of cases holding that a consent judgment can be modified only upon a showing of changed circumstances of fact or law which make the continued

operation of the decree inequitable. *E.g. Swift & Co.* v. *United States, supra; United States* v. *Swift & Co.*, 286 U. S. 106 (1932); *Western Union Tel Co.* v. *International Brotherhood*, 133 F. 2d 955 (7th Cir. 1943); *Coca-Cola Co.* v. *Standard Bottling Co.*, 138 F. 2d 788 (10th Cir. 1943). See Dabney, *supra*, 68 YALE L. J. at 1347.

There was no showing in the District Court of any new factual circumstances which would make continued operation of the decree inequitable. On the contrary, Columbia's uncontradicted affidavit showed that the relevant factual circumstances are the same now as they were at the time of entry of the Final Judgment. There was no claim, and the District Court did not find, that any change had occurred in the law which made necessary a modification of the decree. Indeed the District Court failed to deal in either of its two opinions with the fundamental question of whether it had the power under the circumstances to modify the Final Judgment by declaring it illegal in part.

The District Court's action is completely contrary to the long-established decisions of this Court and raises questions of fundamental importance to the enforcement of the antitrust laws. Approximately 75 per cent of all civil cases brought by the Government under the Sherman Act are settled by consent judgments. The District Court's decision undermines the right of parties to consent judgments to rely on those judgments as *res judicata* subject to change only by unforeseen circumstances which would make the continued operation of the judgment inequitable. It is likely that antitrust litigants will be deterred from entering into consent judgments and any aid which these decrees provide in enforcing the antitrust laws may be lost. Of necessity, considerable uncertainty will be cast on the many consent decrees now operative.

Further, the "petition for modification" here may be construed to have been made under Rule 60(b). See *Sunbeam Corp.* v. *Charles Appliances,* 119 F. Supp. 492 (S. D. N. Y. 1953). If so, the opinion of the court below would have the effect of extending that Rule far beyond its present limits, and is likely to inject great uncertainty into its operation. The decision of the District Court should be reversed.

The Second Question is Substantial.

Assuming *arguendo* and contrary to fact and law that the District Court had the power to consider *de novo* the legality of the Final Judgment, it nevertheless erred in holding the decree in part illegal without a hearing. This Court has held that a consent judgment may not be modified without an evidentiary hearing. *Hughes* v. *United States,* 342 U. S. 353 (1952); *Liquid Carbonic Corp.* v. *United States,* 350 U. S. 869 (1955). And, this Court has cautioned against the use of summary judgment in complex antitrust matters. *Poller* v. *Columbia Broadcasting System, Inc.,* 368 U. S. 464 (1962). It has also cautioned against the application of a *per se* rule to a new and unique set of circumstances without an examination of the facts to determine the actual impact on competition. *White Motor Co.* v. *United States,* 372 U. S. 253 (1963).

In holding Columbia's contract provision to be *per se* illegal, the District Court relied on *Dr. Miles Medical Co.* v. *John D. Park & Son Co.,* 220 U. S. 373 (1911). The rationale of *Dr. Miles* is that an agreement for resale price maintenance is illegal because once a seller has parted with title to a commodity and it has passed into the normal channels of trade, that seller should not be able to restrain free competition among dealers in that commodity. But,

as a hearing on the facts would have shown, the rationale of *Dr. Miles* is inapplicable to the unique facts of this case.

In essence, the District Court equated the sale of an artist's services with that of a tube of toothpaste. It does not matter to a tube of toothpaste how much is charged for its sale. But it is crucially relevant to an artist how much is charged for his services because an artist's established fee is intimately related to, and, in part, comprises that artist's reputation. He may be severely damaged if he is used as a loss-leader or a year-end sale. Simply put, the artist's traditional and deeply felt concern for obtaining his established fee reflects a desire to prevent trafficking in his reputation. And, an artist's reputation is essential to his professional advancement. *Dr. Miles* should not be stretched to the point where it permits indiscriminate trafficking in artists' reputations and the possible destruction of their professional careers.

Before striking down as *per se* illegal a practice which has for years permeated a unique industry, the District Court should have held a hearing to ascertain the factual setting for the practice and its actual impact on competition. Instead, the District Court chose to theorize and, as a result, misapplied the *Dr. Miles* rationale. This Court should remand for a full hearing on the merits.*

The Third Question is Substantial.

Assuming *arguendo* and contrary to fact and law that the District Court had the power to modify the Final Judgment in the absence of any showing of a change in

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* The District Court's opinion on reargument implies that Columbia did not request a hearing. On the reargument, however, counsel for Columbia said: "On the issue of legality . . . there would be a necessity for a hearing because we raised issues of fact."

circumstances which made its continued operation inequitable, and that the District Court was correct in finding, without a hearing on the facts, that Columbia's contract provision was *per se* illegal, the District Court should have granted Columbia's motion to vacate the judgment instead of letting it stand as modified. Consent decrees are based on consent. Courts therefore will not require parties to sign them, *United States* v. *Ward Baking Co.*, 11 L. E. 2d 743 (1964); *United States* v. *Hartford-Empire Co.*, 1 F. R. D. 424 (N. D. Ohio 1940), and are reluctant to alter them substantially without the parties' agreement. *Artvale Inc.* v. *Rugby Fabrics Corp.*, 303 F. 2d 283 (2nd Cir. 1962); *May* v. *Moss*, 194 F. 2d 133 (8th Cir. 1952), *cert. denied*, 343 U. S. 952 (1952); *Steingruber* v. *Johnson*, 35 F. Supp. 662 (M. D. Tenn. 1940); See *Anno.* 139 ALR 421. In this case the District Court declared illegal a practice which is an integral part of the concert service industry, and which consequently permeated a substantial portion of the Final Judgment. Columbia would not have consented to a decree differing with respect to the provisions for the artist's established fee from that to which it agreed in 1955, but would have contested the action in a full-dress law suit. The judgment as now modified does not reflect the consent of the parties bound by it. It is no longer a consent judgment and justice requires that it be vacated.

In addition, the decree as modified is almost useless as a tool for enforcing the antitrust laws. This Court has said that an antitrust decree must be fashioned "in such way as to prevent future violations and eradicate existing evils. . . ." To accomplish this "[a] full exploration of facts is usually necessary." *Associated Press* v. *United States*, 326 U. S. 1, 22 (1945); see also *United States* v. *Ward Baking Co., supra.* In this case the District Court, without any exploration of the facts, struck down a

substantial part of a decree entered by consent by another judge nine years previously, and gave no consideration whatever to whether the remainder is a sufficiently clear guide for the parties and for the industry. This is hardly consistent with the directives of *Associated Press*. Its shortcomings are here clearly revealed for Columbia has been left in complete confusion as to what has been "eradicated" and what is allowed.

As an example, it will be recalled that the District Court stated in its first opinion that ". . . Summy-Birchard may charge its audience associations [for artists] whatever it pleases, because allowing Columbia to set these prices is illegal resale price maintenance. . . ." (App. A p. 12). Assuming an artist has an established fee of $1,000, but Summy-Birchard (or, more properly, Civic, its subsidiary concert service) uses the artist as a loss leader and charges audience associations $750 for that artist's performance while paying $1,000 (less margin) to the artist, the following questions, among others, are raised:

1. It may be that one of Community's audience associations would inform Community that it wishes to engage the artist at the $750 fee paid by Civic's audience associations and that if the artist is not made available at that price, a Summy-Birchard artist will be engaged. If Columbia agrees to the $750 price, does it violate Paragraph VI(C) of the decree which prohibits it from offering any artist managed by it " . . . to any audience association for less than the artist's established fee for the purpose of dissuading the association from engaging an artist not managed by [Columbia]"? If, on the other hand, Columbia refuses, does it violate Paragraph VI(A) which prohibits it from refusing to make available an artist managed by it ". . . to any financially responsible audience association at

the same fee charged by such artist to comparable audience associations . . .''? (App. B p. 27).

2. If the artist informs Columbia that he will not appear if the audience association is charged $750, even though he may receive the full $1,000 (less margin), what is Columbia's obligation? Must Columbia inform the artist that he is obliged to appear for $750 so long as he receives $1,000 (less margin) because under the District Court's opinion Summy-Birchard and not the artist determines the price to be paid by the audience association? Or, may Columbia inform Civic that it will not make the artist available? If Columbia informs Civic that it will not make the artist available even though the artist will receive $1,000 (less margin), does Columbia violate Paragraph VI(A) of the Final Judgment as now modified by the District Court?

In sum, the decree as it now stands is of no help to the parties and has thoroughly confused the industry. It should be vacated.

Further considerations deriving from the nature of a consent decree also dictate vacation of the judgment. A consent decree is not a contract, but is contractual in nature, *e.g. May* v. *Moss,* 212 F. 2d 400 (8th Cir. 1954); *Backus* v. *United States,* 59 F. 2d 242 (Ct. Cl. 1932), *cert. denied,* 288 U. S. 610 (1933); *United States* v. *Radio Corp. of America,* 46 F. Supp. 654 (D. Del. 1942), *appeal dismissed,* 318 U. S. 796 (1943); *Watson* v. *United States,* 34 F. Supp. 777, 780 (M. D. N. C. 1940), being the product of bargaining between the parties. See Note, 63 Harv. L. Rev. 320 (1949). It has been frequently held that where an integral part of a contract is found violative of the antitrust laws the entire agreement will be struck down. *Edward Katzinger Co.* v. *Chicago Metallic Mfg. Co.,* 329 U. S. 394 (1947); *MacGregor* v. *Westinghouse Electric & Mfg. Co.,* 329 U. S. 402 (1947);

United States v. *Bayer Co.*, 135 F. Supp. 65, 73-74 (S. D. N. Y. 1955). This is because it is impossible for a court to visualize what the parties would have agreed to had they known that something of importance to both was illegal. See *United States* v. *Shubert*, 163 F. Supp. 123 (S. D. N. Y. 1958). The same reasoning applies here. The District Court is not qualified to construct a decree the parties would have consented to, particularly where there has been no hearing on the facts. It should have vacated the decree and left the parties at arms length.

Conclusion.

The questions presented here are substantial and appropriate to full briefing and oral argument before this Court.

Respectfully submitted,

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APPENDIX A.

Opinion.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, Plaintiff, *against* COLUMBIA ARTISTS MANAGEMENT, INC.; COMMUNITY CONCERTS, INC.; NATIONAL CONCERT AND ARTISTS CORPORATION; and CIVIC CONCERT SERVICE, INCORPORATED, Defendants, SUMMY-BIRCHARD, INC., Defendant.	Civ. 104-165

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KUPFERMAN & PRICE, of New York, New York, Attorneys for Defendant Summy-Birchard, Inc., THEODORE KUPFERMAN, Esq., of Counsel.

Opinion.

TYLER, D. J.

This civil anti-trust action was brought by the government in this District on October 20, 1956. On the same date a consent decree ("decree") was executed and entered by the parties. Article IX of the decree retained jurisdiction of this court:

> "for the purpose of enabling any of the parties to this Final Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment or for the modification of any of the provisions thereof, the enforcement of compliance therewith and the punishment of violations thereof."

Pursuant to this Article, defendants Columbia Artists Management, Inc. ("Columbia") and its subsidiary, Community Concerts, Inc. ("Community"),[1] have petitioned for a construction of the decree.

The original action by the government was brought against Columbia and Community, and against National Concert and Artists Corporation ("National") and National's subsidiary Civic Concert Service, Incorporated ("Civic"). The business of National is now being carried on by the Summy-Birchard Company ("Summy-Birchard"), and the business of Civic is now being carried on by the Civic Concert Service division of Summy-Birchard. By the terms of Article III, Summy-Birchard, as National's and Civic's successor, is bound by the decree.

Columbia and Summy-Birchard are both large-scale managers of professional concert musicians. The business of Community and the Civic division of Summy-Birchard is that of organizing and maintaining local non-profit "audience associations" throughout the country. These

[1] Sometimes hereinafter referred to interchangeably as "Columbia".

associations provide forums for professional concert musicians, primarily in smaller cities, by setting up annual series of concerts financed by dues subscribed in advance. Community and Summy-Birchard make their profits on this operation by in effect obtaining a portion of each fee paid to a performer by one of the audience associations organized and maintained by them.

The consent decree entered in this court in 1955 provided that:

> "V. Civic and Community are each ordered and directed:
>
> "(A) To place an advertisement each year in an October issue of *Musical America,* or similar publication, informing managers that such defendant will furnish to all audience associations which it organizes or maintains the information submitted to it within the two months next succeeding publication, by any manager with respect to the general availability and established audience association fee of any artist managed by him who desires to perform before audience associations and agrees to allow to the defendant a margin equal to the customary margin allowed to such defendant by other artists with comparable fees;
>
> "(B) To furnish to each audience association which shall be organized or maintained by such defendant all information furnished to such defendant pursuant to subsection (A) of this Section V;
>
> * * * * * *
>
> "VI. Each defendant is enjoined and restrained from:
>
> "(A) Refusing to make available any artist managed by the defendant to any financially responsible audience association at the same fee charged by such artist to comparable audience associations

where the artist is reasonably available for the desired performance;

* * * * * *

"(C) Offering any artist managed by such defendant to any audience association for less than the artist's established fee for the purpose of dissuading the association from engaging an artist not managed by such defendant;

"(D) Refusing to make available to any financially responsible concert service any artist managed by such defendant and reasonably available for the desired performance, at the same margin allowed to the defendant or its affiliated concert service by that artist for a performance for the same fee;"

By the terms of the decree, then, Columbia as manager of a substantial number of artists must make such artists available, subject to the artists' approval, to concert services other than Community, including the Civic division of Summy-Birchard. In making them available, Columbia requires the concert service to sign a standard contract which, in effect, and in purported compliance with the decree, binds the taking concert service to pay the artist a certain number of dollars ("established fee" less "margin"), to charge the audience association a certain number of dollars ("established fee") and, in effect, to retain for itself the difference ("margin"). This results in an absence of price competition between Community and other concert services with respect to performances by artists managed by Columbia. The form contract in significant part is set forth in the margin.[2]

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[2] "COLUMBIA ARTISTS MANAGEMENT INC.

* * *

"AGREEMENT BETWEEN LOCAL MANAGER [the concert service] AND ARTIST

* * *

Opinion.

Columbia and Community have made this application for construction of the decree because of disputes which have arisen between them and Summy-Birchard. Summy-Birchard has informed Columbia that it considers the present contract required by Columbia of concert services as a prerequisite to obtaining Columbia-managed artists to constitute an illegal scheme to maintain resale prices. Summy-Birchard admittedly has continued to sign the contracts in order to get Columbia performers, but only "under protest". Moreover, Summy-Birchard has devised a new system of organizing and maintaining audience associations which, in its view, does not meet with such an objection. Under what is called its "modified selective plan" Summy-Birchard passes on to its audience associations the entire margin for each performer. Summy-Birchard takes its remuneration under its plan by charging each association a percentage of that association's total yearly billings. This percentage (12%) is currently much smaller than the standard margin fees set by Community.[3] Thus, it is said that the audience associations which operate under Summy-Birchard's new system are able to save substantial sums in presenting their desired concerts. Summy-Birchard makes up (at least in part) for this loss of income to it by sharply reducing the services provided by its field

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"TYPE OF ENGAGEMENT:

* * *

"The authority of Artist's Manager [Columbia] is limited by the agreement between Artist and Artist's Manager to arranging for performances by Artist at fees set forth in the schedule heretofore furnished to Local Manager.

"It is agreed that this contract for the appearance of (Name of Artist) is solely for the purposes of an engagement on the organized audience series in (Town) for (Dates) at the fee of $ per engagement provided for in Columbia listings and any offer or arrangement to change the sponsorship or fee without the prior consent in writing obtained by the artist or his manager will void this contract."

[3] Columbia publishes an annual margin schedule in which margin works out to approximately one-third of the established fee.

representatives to the local associations. Summy-Birchard will still provide these omitted services if they are desired, but only for substantial direct fees or charges.

In practical effect, Summy-Birchard under its new plan would be compensated as a concert service by an audience association in an amount consisting of the reduced margin of 12% plus direct charges for specific services as required by the particular association in question, and not according to the margin currently used by Columbia—*i.e.*, approximately one-third of the artist's fee. This in turn might mean, as a practical matter, that audience associations which have difficulty in organizing and maintaining themselves would often have to pay more than under past practice, while audience associations which have little such difficulty would pay less.

Columbia maintains in its first claim that Summy-Birchard's Civic division as it operates under the modified selective plan is not a concert service within the scope of the decree; thus, as manager of a substantial number of musicians, Columbia has refused to make its clients available at the audience association rate to Summy-Birchard for engagements before audience associations operating under Summy-Birchard's new scheme.

Columbia thus asks this court to construe the decree so as to condone Columbia's continued refusal to deal with Summy-Birchard as a concert service when the latter operates under its modified plan and to approve Columbia's form of contract which it presently requires of concert services desiring the appearances of Columbia-managed artists.

The decree, of course, was consented to by Summy-Birchard's predecessor only eight years ago. Whatever this court may feel about the desirability of a decree which condemns this industry to a Procrustean bed, this is the bed which its members have made for themselves. The stability of judgments and the policy of law enforcement permitting anti-trust consent decrees dictate that, absent

extreme countervailing circumstances, they should be made to lie in it. Accordingly, in deciding whether Summy-Birchard is a concert service under the decree, I will not enter into a consideration of the minute details of the industry, but will proceed to construe the plain words of the decree, at least where they appear to be not inequitable or illegal, regarding the validity of Summy-Birchard's claim to be a concert service when operating under its modified plan.[4]

Article II of the Final Judgment contains the following definitions:

> "(F) 'Audience association' shall mean a non-profit association organized for the purpose of presenting concerts (normally a minimum of three in any season) in one locality, financed by membership dues subscribed in advance;
>
> "(G) 'Concert service' shall mean a person who is commercially engaged in organizing and maintaining audience associations and who, without charge to such associations, either himself acts as a field representative or supplies one or more field representatives for that purpose;
>
> * * * * * * *
>
> "(J) 'Margin' shall mean the portion of an artist's established fee which such artist authorizes a concert service to retain in consideration of the expenses incurred in organizing and maintaining audience assocations;"

It seems clear that a concert service which does not supply a field representative and supply substantial services without charge to its audience associations is not a

[4] The government takes the position here that Columbia and Community are correct in urging that Summy-Birchard, when operating under its modified plan, is not a concert service within the relevant provisions of the decree.

"concert service" under the decree and thus is not entitled to "margin" as defined therein. The fact that a portion of the margin, if allowed, would go to the audience associations, which could then hire firms, such as Summy-Birchard, to perform the services is irrelevant to the letter of the decree. Moreover, the decree does not in this area necessarily conflict with the law, although the prescribed scheme might be theoretically regarded as a step in effectuating the decree's apparent intent of putting the ultimate price for the artist's services into the control of the artist or the artist's manager, since it does not, of itself, require such price maintenance.

A more troublesome question is raised by Columbia and Community in the second claim of their petition. It stems from advices written to them by Summy-Birchard that the contracts which Columbia requires Summy-Birchard to enter into as a condition precedent to getting Columbia-managed performers are illegal, in the opinion of Summy-Birchard, under the Sherman Act as constituting a proscribed scheme to maintain resale prices. As indicated heretofore, Summy-Birchard has continued to sign the Columbia-Community contracts, but only "under protest". Columbia and Community ask this court to find that the contracts in question are not illegal, under the decree or otherwise.

The government has filed a memorandum urging that this dispute between the other parties is not one subject to the jurisdiction of the court. The government bases this contention upon the arguments that the dispute in reality does not arise from the consent decree, and so cannot properly be considered on an application for construction, and, moreover, that it is a sham dispute and so is not a case or controversy cognizable by the judicial power of the United States.

The scheme of the concert service business conducted by Community and the Civic division of Summy-Birchard which is embodied in the decree clearly envisions that the

artist or his manager will be able to control the ultimate price paid by the "consumer"—audience association, impressario, or whoever assumes the risk of "producing" a show. Were this not so, the definition of "margin" in the decree would be meaningless. Since this court by its decree—albeit a consent order—has sanctioned *pro tanto* this structuring of the industry, it should not be slow to consider charges of illegality against the system. On the other hand, it must be remembered that this action is one by Columbia to vindicate the *status quo*, not one by Summy-Birchard or the government to attack it. It is necessary to a proper working of an adversary judicial system that courts not entertain proceedings where there is no genuine dispute between opposing parties. This stricture has the dignity of a constitutional limitation upon the jurisdiction of federal courts. Summy-Birchard, then, must seriously maintain its contention of the contracts' illegality, in the sense that it cares enough about the question to affect its actions in order for this court to have jurisdiction. It is clear at this point, particularly by virtue of additional papers submitted and additional hearings held after the initial pleadings and argument, that Summy-Birchard does care enough about the question to make an adequate presentation of its case as an adversary. At least in the special circumstances of this case, in which the court has already retained jurisdiction to hear motions for construction of its decree and in which it appears that the legality of the decree, or at least of practices envisioned by or naturally flowing from the decree, is being questioned,[5] it would seem to be hypertechnical and time-consuming judicial administration to reject jurisdiction of this particular dispute just because Summy-Birchard has not filed a paper labeled "petition for declaratory judgment" or

[5] *Cf., United States* v. *Swift & Co.*, 286 U. S. 106, 114-115 (1932) ("[A] court does not abdicate its power to revoke or modify its mandate if satisfied that what it has been doing has been turned through changing circumstances into an instrument of wrong.")

"petition for modification", particularly if substantially the same facts and arguments to be raised by such putative formal pleadings are now before the court.

Summy-Birchard has contended here that a concert service "buys" an artist's services and "resells" them to the audience associations. If this be so, there is a scheme or system effectuated through the "sales" contracts between the artist or his manager and the concert service to control the price at which the concert service can sell the artist's performance to an audience association. Such a scheme would be illegal *per se* under section 1 of the Sherman Act (15 U. S. C. §1)[6] since it does not fall within the "trademarked product" exception created by the Miller-Tydings and McGuire amendments to that Act (15 U. S. C. §1).

But if a concert service is no more than an agent, either of the artist or of the artist's manager or of the audience association, there is of course no "sale" and no illegal pattern which falls afoul of the Sherman Act.[7]

Certain conceptual difficulties might be said to arise from the fact that the subject of the sale or agency is an artist's performance (or contract to perform) at a unique time and place, whereas most of the adjudicated cases involving questions of resale price maintenance deal with relatively fungible "physical" products. But if there is a regular and established market for services, no matter how unique such may be in certain aspects, the existence of a market for them in which they are to a large extent interchangeable engenders a trade of which there can be illegal restraints within the ambit of the Sherman Act. That there is such a market for artists' concerts before audience associations is clearly established from the existence as well as from the words of the consent decree, and from the present pleadings and papers of all the parties.

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[6] *Dr. Miles Medical Co.* v. *John D. Park & Son Co.*, 220 U. S. 373 (1911).

[7] *United States* v. *General Electric Co.*, 272 U. S. 476 (1926).

I conclude, therefore, that this trade can be illegally restrained through resale price maintenance.

It is plain that the concert services are not agents of the audience associations under the present scheme, since their fee ("margin") is admittedly not bargained for or set by the audience associations.

It is more difficult to determine whether the concert services are agents of the artists or of the artists' managers. Columbia and Community stoutly maintain that their fees are set by these parties in accordance with the decree. Summy-Birchard, however, has submitted in an affidavit a schedule published by Community showing a fixed series of margin rates to which all performers booked through them are apparently subject. The accuracy of this document has not been questioned. The practical effect of this practice is that Community (the dominant firm in the industry) dictates to the artists the percentage it will take of their fees if they play before any of the Community-serviced audience associations. Community then turns around and requires its audience associations to pay the full "established price" of the artists. And further, as a condition to making its artists available to Summy-Birchard and other concert services, Community's parent Columbia enforces the same standard of behavior upon its competitors.[8] In doing this Columbia is materially aided by the decree, as may be seen by the invalidity of Summy-Birchard's modified selective plan. That plan, if proper under the decree, would, of course, obviate this problem.

Thus, insofar as the decree-imposed requirement of margin operates to allow Columbia to set resale prices, the decree is illegal and void as contrary to the letter and policy of the Sherman Act, and this court will not construe Columbia's continued reliance upon that portion of the decree to be in any way valid.

Invalidation of such part of the consent decree does not mean, however, that when Summy-Birchard books Colum-

[8] *Cf. United States* v. *Masonite Corp.*, 316 U. S. 265 (1942).

bia-managed artists for engagements before audience associations with which it deals on the basis of directly charging the associations for field representatives or other ordinary expenses of establishing and maintaining the associations, Columbia must allow a deduction of margin from the artists' established price. For the reasons advanced earlier, I will not relieve the parties to the decree from complying with that judgment save where it is patently void. Thus, Summy-Birchard may charge its audience associations whatever it pleases, because allowing Columbia to set these prices is illegal resale price maintenance, but Columbia need not give Summy-Birchard the margin or "price cut" given concert services under the decree unless Summy-Birchard provides the requisite services to fulfill the decree's definition of a concert service.

The request for a construction of the decree approving Columbia's refusal to give Summy-Birchard margin when it operates under its modified plan (Claim I) is granted. The request for a construction approving Columbia's contracts with concert services (Claim II) is denied.

There remains open one collateral issue raised by Columbia in Claim I of its petition. As part of its prayer for relief under that Claim, Columbia has requested a direction that Summy-Birchard or Civic return to Columbia "as trustee" certain moneys deducted by Civic as margin in connection with performances of Columbia-managed artists before audience associations with which Civic dealt under the so-called Summy-Birchard modified selective plan. In view of this court's disposition of the main thrust of Claim I in Columbia's favor, it is at least theoretically possible that Civic should be required to return such moneys. The record is unclear and incomplete as to what amounts might be due and owing. Moreover, the parties at one point during the hearings seemed to agree that if Columbia were upheld on Claim I, a stipulation as to amount could be easily worked out. Accordingly, unless and until advised to

the contrary, I will assume that provision for this issue can be agreed upon at the settlement of a final order.

Indeed, an order encompassing all of the foregoing matters should be settled on notice.

Dated: New York, N. Y.
November 19, 1963.

s/ H. R. Tyler, Jr.
U. S. D. J.

Memorandum.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

UNITED STATES OF AMERICA, Plaintiff, *against* COLUMBIA ARTISTS MANAGEMENT INC.; COMMUNITY CONCERTS, INC.; NATIONAL CONCERT AND ARTISTS CORPORATION; and CIVIC CONCERT-SERVICE, INCORPORATED, Defendants, SUMMY-BIRCHARD, INC., Defendant.	Civ. 104-165

TYLER, D. J.

The motion of Columbia Artists Management Inc., and Community Concerts, Inc., for reargument is granted for the purpose of determining whether an evidentiary hearing should be had on the following question: Whether Community Concerts, Inc., be in such agency relationship with the audience association it organizes and maintains as to preclude its resale of artists' services to them, and so to preclude resale price maintenance under the rationale of *United States* v. *General Electric Co.*, 272 U. S. 476 (1926).

Hearing of the reargument will be held at 4:00 p.m. on January 27, 1964, in court room No. 1106. Affidavits and memoranda will be accepted at that time.

/s/ H. R. TYLER, J.
U. S. D. J.

January 14, 1964.

Opinion On Reargument.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

UNITED STATES OF AMERICA, Plaintiff, *against* COLUMBIA ARTISTS MANAGEMENT, INC.; COMMUNITY CONCERTS, INC.; NATIONAL CONCERT AND ARTISTS CORPORATION; and CIVIC CONCERT SERVICE, INCORPORATED, Defendants, SUMMY-BIRCHARD, INC., Defendant.	Civ. 104-165

JOHN J. GALGAY, Esq., LOUIS PERLMUTTER, Esq., and WILLIAM D. KILGORE, JR., Esq., Attorneys, Department of Justice, for Plaintiff.

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RALPH F. COLIN, Esq., SEYMOUR D. LEWIS, Esq., GILBERT S. EDELSON, Esq., HAROLD S. LEVY, Esq., of Counsel.

KUPFERMAN & PRICE, of New York, New York Attorneys for Defendant Summy-Birchard, Inc., THEODORE KUPFERMAN, Esq., of Counsel.

TYLER, D. J.

The thrust and context of this motion for reargument filed by defendants Columbia Artists Management, Inc. and

Community Concerts, Inc. can best be illustrated by a precis of the history of this anti-trust litigation to date.

On October 20, 1955, the United States filed a criminal information and a civil complaint against Columbia and its wholly owned subsidiary Community Concerts, Inc. (collectively referred to as "Columbia" hereafter), against National Concert and Artists Corporation and its subsidiary Civic Concert Service, Inc. (predecessors of Summy-Birchard Inc. and hereafter referred to as "Summy-Birchard"), and against certain individuals. On the same day the information was answered with pleas of *nolo contendere*, fines totaling $16,000 were imposed, and answers and a consent decree were filed.

On July 26, 1963, Columbia petitioned for a construction of this decree regarding two points. First, Columbia sought court approval for not treating Summy-Birchard as a concert service entitled to margin under the decree when Summy-Birchard operated under its "modified selective plan". After several arguments and hearings in the summer and fall of 1963, the court gave in its opinion of November 19, 1963 in which Columbia's first claim or request was in substance granted. Second, Columbia urged the court to find and rule that a standard contract provision used by them in "selling" performances to other contract services was proper under the decree. This the court refused to do in its same opinion of November 19. Thereafter, upon the motion of Columbia, limited reargument was granted with respect to this second part of its opinion, and further papers were submitted and extensive argument was had on several occasions upon this portion of the opinion, not only on the question of agency, on which the court had directed reargument, but on the question of whether there was a legitimate controversy before the court which would confer upon it jurisdiction.

In its second request for construction, Columbia alleged that Summy-Birchard had advised it in writing that a provision in Columbia's form contract constituted illegal

resale price maintenance, and that Summy-Birchard would only sign contracts containing such a clause "under protest". In its original answering papers before this court, Summy-Birchard affirmed its position that Columbia was forcing it into illegal resale-price maintenance contracts, and asked that the parent company, Columbia Artists Management, Inc., be prohibited, under the decree, from engaging further in the concert service business through its subsidiary Community Concerts, Inc. or otherwise.

In its original papers in answer to Columbia's construction petition, the Department of Justice had not taken a position in this phase of the dispute, maintaining it to be a sham controversy and so not within the jurisdiction of the court, at least until this court rendered its opinion of November 19, in which it found jurisdiction.

During hearings on Columbia's motion for reargument, it became evident that Summy-Birchard was no longer seriously attacking the contract provision; having made its point in effect with regard to the second claim for construction by Columbia, it now let it be known that it would not seriously object if the court reversed itself on reargument. The government, however, by the time of the second hearing on reargument, had come to the support of Summy-Birchard's original charge of resale price maintenance, and had abandoned its position that the court did not have jurisdiction.

One practical result of this elaborate minuet is that, throughout, there have been adversary parties, albeit not the same ones, engaged in a real dispute. The fact that, after reading the original opinion rendered by this court, Summy-Birchard decided to virtually abandon its original position should not be used to read back a lack of adversary parties before the opinion, both because of the weakness in logic of such an argument, and because it would undermine the duty of fair dealing owed by the parties and their attorneys to the court. In any event, there is currently an adversary situation with a real dispute between the govern-

ment and Columbia; indeed, it can be argued that what went on before is not crucially relevant to the question of whether there is now genuine opposition to Columbia's motion for construction.[1]

Proceeding to the question of agency, which provided the substantial original basis for the reargument, the situation as set forth by Columbia appears to be that an audience association, in exchange for the promise of a concert service to organize and maintain it, agrees to take its requirements for performers through the concert service. To debate in the abstract whether it is proper in this situation to call the concert service the "exclusive booking agent" of the audience association, as apparently been the practice in the industry, misses the point.

The significant point is that the services of artists are being sold by their manager Columbia. The question is whether Columbia can dictate or interfere in the financial arrangements between Summy-Birchard, which as a concert service arranges for the ultimate purchase of such services by an audience association, and the audience association. Whether these "arrangements" are called "purchases and resales", or "agency", or something else, is largely irrelevant. To permit a prior seller to dictate the terms between two subsequent parties, neither of which is in the kind of an agency relationship *with the prior seller* which was found and sanctioned in the *General Electric*[2] case, clearly would be to permit a combination in restraint of trade forbidden by the Sherman Act.

Not only is trade restrained in the narrow scope of pricing arrangements between Summy-Birchard and the audience association forbidden by the *Dr. Miles*[3] rule, but

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[1] Indeed, Columbia's counsel has argued consistently and to the end that there is still a substantial controversy between it and Summy-Birchard on the second claim for construction (SM 17 et seq. February 4, 1964).

[2] *United States* v. *General Electric Co.*, 272 U. S. 476 (1926).

[3] *Dr. Miles Medical Co.* v. *John D. Park & Son Co.*, 220 U. S. 373 (1911).

in a wider area also, as was noted in the November 19 opinion by this court. Columbia not only manages a large number of the performers in the trade, but through its own concert service offers performers to audience associations. Under the existing system of contractural restraints, Columbia's concert service in effect can charge what it pleases for making arrangements with audience associations for Columbia-managed performers, secure in the knowledge that its competitor Summy-Birchard cannot charge less for the same performers and so induce Columbia-maintained audience associations to come into Summy-Birchard's fold. This aspect of trade restraint would be a *per se* violation even if the "produce" were trademarked and the resale price maintainance were thus brought within the protection of the McGuire Act.[4] *United States* v. *McKesson and Robbins*, 351 U. S. 305 (1956).

In its motion for reargument, Columbia cites *White Motor Co.* v. *United States*, 372 U. S. 253 (1963), in which summary judgment was held an inadequate vehicle to establish the illegality under the Sherman Act of a novel question of territorial allocation. That the *White* opinion was not designed to affect the validity of *Dr. Miles*, even when the latter decision is applied to novel "products", is apparent from the reaffirmation of the *per se* rule against resale price maintenance at page 260 of the opinion. *White*, therefore, does not appear to be persuasive authority to hold any evidenciary (sic) hearings in this case.[5]

In any event, on Columbia's own statement of the facts, and accepting as true the facts—albeit not the legal conclusions—stated in the affidavit of Columbia vice-president Richard Yarnall which was submitted on reargument, it

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[4] 15 U. S. C. §45.

[5] To the extent this court views the problem as essentially one of construction, it could be argued that counsel for Columbia in effect conceded at the last hearing on reargument that there are no additional facts to be adduced which would bear significantly on the issue. (SM 15-16, February 4, 1964).

seems clear that the contractual clause is a *per se* violation of the Sherman Act which this court cannot and will not sanction even to the extent of finding it in conformity with the consent decree.

The opinion of November 19 is accordingly reaffirmed. An order should be settled as directed in that earlier opinion.

Dated: New York, N. Y.
April 3, 1964.

H. R. TYLER, JR.,
U. S. D. J.

Order.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

UNITED STATES OF AMERICA, Plaintiff, v. COLUMBIA ARTISTS MANAGEMENT INC.; COMMUNITY CONCERTS, INC.; NATIONAL CONCERT AND ARTISTS CORPORATION; and CIVIC CONCERT SERVICE, INCORPORATED, Defendants, & SUMMY-BIRCHARD, INC., Defendant.	Civ. 104-165

The defendants Columbia Artists Management Inc. ("Columbia") and Community Concerts, Inc., ("Community") having filed a petition on July 18, 1963 for orders and directions for the construction of the Final Judgment entered herein on October 22, 1955 which petition sets forth Claims I and II and the defendant Summy-Birchard, Inc., ("Summy-Birchard") having filed its answer to the said petition, and the United States having appeared herein and the Court, after hearing all the parties rendered its opinion dated November 19, 1963 granting Columbia's Claim I and denying Columbia's Claim II, and Columbia having moved for reargument of so much of the Court's opinion which denied Claim II, and the Court having granted reargument and after hearing all the parties rendered its opinion on April 3, 1964 reaffirming its opinion of November 19, 1963, it is

Order.

ORDERED, ADJUDGED AND DECREED:

1. With respect to Claim I, that where Summy-Birchard, through its division, Civic Concert Service, or otherwise, and an audience association enter into an agreement known as the "Selective Plan" (Petition, Exhibit B) or any other plan substantially the same, Summy-Birchard does not act as a concert service, as defined in paragraph II(G) of the Final Judgment herein for that audience association and Columbia does not violate any provision of the Final Judgment when it refuses to permit Summy-Birchard, or the entity through which it acts to deduct the portion of an artist's fee known as "margin" when the artist is engaged for an appearance before such audience association.

2. The Court has jurisdiction to determine the issues raised by Claim II. The provision in Columbia's contract (Petition, Exhibit D) that each engagement before an audience association shall be performed at the artist's established fee constitutes illegal resale price maintenance and is a *per se* violation of Section 1 of the Sherman Act (15 U. S. C. §1). To the extent that the Final Judgment operates to allow Columbia to set such resale prices, it is illegal and void as contrary to the Sherman Act, and any continued reliance by Columbia upon such portion or portions of the Final Judgment will not be construed by the Court to be in any way valid.

Dated: June 11, 1964.

H. R. TYLER, JR.
United States District Judge

APPENDIX B.

Final Judgment.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

UNITED STATES OF AMERICA, Plaintiff, *vs.* COLUMBIA ARTISTS MANAGEMENT INC.; COMMUNITY CONCERTS, INC.; NATIONAL CONCERT AND ARTISTS CORPORATION; and CIVIC CONCERT SERVICE, INCORPORATED, Defendants.	Civil Action. No. 104-165

The plaintiff, United States of America, having filed its complaint herein on Oct. 20, 1955, and the defendants herein having appeared and filed their answers to the complaint denying the substantive allegations thereof; and the plaintiff and said defendants by their attorneys having severally consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law herein, and without admission by any party in respect of any such issues;

NOW, THEREFORE, before any testimony has been taken herein, and without trial or adjudication of any issue of fact or law herein, and upon consent as aforesaid of all the parties hereto,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, as follows:

I.

The Court has jurisdiction of the subject matter herein and of all the parties hereto. The complaint herein states

a claim upon which relief could be granted against the defendants under Sections 1 and 2 of the Act of Congress of July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the Sherman Act, as amended.

II.

As used in this Final Judgment:

(A) "National" shall mean defendant National Concert and Artists Corporation, a New York corporation;

(B) "Civic" shall mean defendant Civic Concert Service, Incorporated, a New York corporation;

(C) "Columbia" shall mean defendant Columbia Artists Management Inc., a New York Corporation;

(D) "Community" shall mean defendant Community Concerts Inc., a New York corporation;

(E) "Artist" shall mean a concert, recital, oratorio, opera or ballet artist or attraction;

(F) "Audience association" shall mean a non-profit association organized for the purpose of presenting concerts (normally a minimum of three in any season) in one locality, financed by membership dues subscribed in advance;

(G) "Concert service" shall mean a person who is commercially engaged in organizing and maintaining audience associations and who, without charge to such associations, either himself acts as a field representative or supplies one or more field representatives for that purpose;

(H) "Manager" shall mean a person who, for a commission, arranges for the performances of an artist or represents or otherwise acts as agent for an artist in connection with performances by such artist;

(I) "Local manager" shall mean a person, other than an audience association, engaged in presenting concerts;

(J) "Margin" shall mean the portion of an artist's established fee which such artist authorizes a concert service to retain in consideration of the expenses incurred in organizing and maintaining audience associations;

(K) "Person" shall mean an individual, partnership, firm, corporation, association or other business or legal entity.

III.

The provisions of this Final Judgment applicable to any defendant shall apply to such defendant, its subsidiaries, successors and assigns and to each of its officers, directors, agents, employees and to all other persons acting under, through or for such defendant.

IV.

Each defendant is enjoined and restrained from combining or conspiring, or from entering into, adhering to, maintaining or furthering, directly or indirectly, any contract, agreement, understanding, plan or program with any other defendant or any other person to:

(A) Allocate or divide territories or markets or otherwise refrain from competition, or leave any person free from competition, in any territory, field or market in the organization or maintenance of audience associations;

(B) Exclude any person from, or refrain or limit any person in, the organization or maintenance of audience associations or the management of artists; or

(C) Refrain from competition, or leave any person free from competition for the management of artists.

V.

Civic and Community are each ordered and directed:

(A) To place an advertisement each year in an October issue of *Musical America*, or similar publication, informing managers that such defendant will furnish to all audience associations which it organizes or maintains the information submitted to it within the two months next succeeding publication, by any manager with respect to the general availability and established audience association fee of any artist managed by him who desires to perform before audience associations and agrees to allow to the defendant a margin equal to the customary margin allowed to such defendant by other artists with comparable fees;

(B) To furnish to each audience association which shall be organized or maintained by such defendant all information furnished to such defendant pursuant to subsection (A) of this Section V;

(C) To prepare and maintain, annually for ten years after entry of this Final Judgment, records as to each audience association organized and maintained by such defendant which shall have scheduled a membership campaign, such records to contain the names and addresses of the president and correspondent of the association and, within ten days after it is set, the date when the membership campaign is scheduled to be held;

(D) To maintain and make available the above records at its principal office, on at least one day per week during regular business hours, for inspection and copying by any manager, or his authorized agent, who has submitted information to the defendant pursuant to subsection (A) hereof, and who will agree (1) to keep confidential the information obtained from the records, (2) to use such information only in connection with artists as to whom information has been submitted to such defendant pursuant to subsection (A) above, and (3) to advise such defendant, prior to offering

his artist to any audience association organized or maintained by such defendant at a fee less than that artist's established f e, that such defendant is authorized to offer said artist at the lower fee;

(E) To use its best efforts to obtain for any audience association organized or maintained by such defendant any artist selected by such association and as to whom information was furnished to such defendant pursuant to subsection (A) hereof and to execute an agreement for the performance of such artist without any delay after completion of the membership campaign and after determining the availability of the artist and obtaining the necessary authority from the artists or his manager.

VI.

Each defendant is enjoined and restrained from:

(A) Refusing to make available any artist managed by the defendant to any financially responsible audience association at the same fee charged by such artist to comparable audience associations where the artist is reasonably available for the desired performance;

(B) Knowingly misrepresenting to any audience association or concert service the fee, availability, reliability or reputation of any artist;

(C) Offering any artist managed by such defendant to any audience association for less than the artist's established fee for the purpose of dissuading the association from engaging an artist not managed by such defendant;

(D) Refusing to make available to any financially responsible concert service any artist managed by such defendant and reasonably available for the desired performance, at the same margin allowed to the defendant or its affiliated concert service by that artist for a performance for the same fee;

(E) Making available the service of any artist on the condition that the service of any other artist be contracted for;

(F) Conditioning the organization of any audience association upon the agreement or understanding that the association present a specified number of concerts in excess of three;

(G) Requiring, directly or indirectly, that any reasonably available artist not perform before any audience association not organized by such defendant or its affiliate;

(H) Acquiring, directly or indirectly, any of the assets, business or good will of, or stock or other financial interest in, any concert service, unless such defendant shall upon reasonable notice to the plaintiff, show to the satisfaction of this Court that such acquisition may not tend to restrain or lessen competition in the business of organizing audience associations in any section of the United States.

(I) Preventing, or attempting to prevent, any manager giving information to such defendant pursuant to subsection (A) of Section V herein from meeting with any audience association to discuss artists to be engaged by such association.

VII.

It being the purpose of this Final Judgment to facilitate and increase the booking of independently managed artists by audience associations organized or maintained by any of the defendants and to promote competition between defendants and between and among independent managers and defendants in the management of artists, the plaintiff may at any time after five years from the date of entry of this Final Judgment petition this court to determine whether such purposes have been achieved and, if the Court is satisfied that such purposes have not been achieved, the defendants shall be prohibited, upon such

terms as the Court may deem appropriate, from engaging in the concert service business.

VIII.

For the purpose of securing compliance with this Final Judgment, duly authorized representatives of the Department of Justice shall, on written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to any defendant made to its principal office, be permitted, subject to any legally recognized privilege,

(a) reasonable access, during the office hours of such defendant, to all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of such defendant, relating to any of the matters contained in this Final Judgment, and

(b) subject to the reasonable convenience of such defendant, and without restraint or interference, to interview officers and employees of such defendant who may have counsel present regarding any such matters.

For the purpose of securing compliance with this Final Judgment, the defendants, upon the written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division, shall submit such written reports with respect to any of the matters contained in this Final Judgment as from time to time may be necessary for the purpose of enforcement of this Final Judgment.

No information obtained by the means permitted in this Section VIII shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Department except in the course of legal proceedings for the purpose of securing compliance with this Final Judgment in which the United States is a party or as otherwise required by law.

Final Judgment.

IX.

Jurisdiction is retained for the purpose of enabling any of the parties to this Final Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment or for the modification of any of the provisions thereof, the enforcement of compliance therewith and the punishment of violations thereof.

SIDNEY SUGARMAN
United States District Judge

Dated Oct. 20, 1955.

We hereby consent to the making and entry of this Final Judgment:

For the Plaintiff:

/s/ STANLEY N. BARNES
Assistant Attorney General

/s/ RICHARD B. O'DONNELL

/s/ W. D. KILGORE, JR.

/s/ HARRY C. SKLARSKY

/s/ WORTH ROWLEY

/s/ LOUIS PERLMUTTER

/s/ FRANCIS E. DUGAN

For the Defendants:

Columbia Artists Management Inc.

National Concert and Artists Corporation

Community Concerts Inc.

Civic Concert Service, Incorporated

CRAVATH, SWAINE & MOORE
GEORGE B. TURNER

CRAVATH, SWAINE & MOORE

By GEORGE B. TURNER,
a Partner

McALOON & HIRSCHBERG
NATHAN HIRSCHBERG

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a Partner